

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 * * *

4 EDITHA SALVADOR,

5 Plaintiff,

6 v.

7 BANK OF NEW YORK MELLON, et al.,

8 Defendants.

Case No. 2:17-cv-02857-APG-CWH

**ORDER GRANTING MOTIONS TO
DISMISS, DENYING MOTION TO
STRIKE AS MOOT, DENYING
MOTIONS FOR SUMMARY
JUDGMENT, AND DENYING
MOTION FOR INJUNCTIVE RELIEF**

(ECF Nos. 11, 14, 19, 39, 41, 48, 67)

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12 Plaintiff Editha Salvador owns property located at 4404 Grey Spencer Drive in Las Vegas.
13 She financed the purchase of the property through an adjustable rate loan that was secured by a
14 deed of trust on the property. After she defaulted on her payments, defendant Bank of New York
15 Mellon (BONY) initiated non-judicial foreclosure proceedings under the deed of trust. In an
16 effort to avoid foreclosure, Salvador filed this lawsuit against BONY, who is the holder of the
17 note and the beneficiary of record under the deed of trust; Quality Loan Servicing Corporation,
18 the trustee under the deed of trust; BONY's former loan servicer, Select Portfolio Servicing, Inc.;
19 Bank of America, to whom Salvador previously made loan payments; and Bayview Loan
20 Servicing, LLC, BONY's current loan servicer. The defendants filed various motions to dismiss
21 the complaint. Salvador moves for summary judgment, and to enjoin the foreclosure sale,
22 currently set for April 27, 2018.

23 I grant the defendants' motions to dismiss because Salvador has failed to allege a valid
24 claim against any of these defendants. I deny Salvador's motions for summary judgment for the
25 same reason and because (contrary to Salvador's contention) the defendants timely responded to
26 her complaint. Even if they had not, I would set aside any default. I Salvador's motion for
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1 injunctive relief because she has not shown a likelihood of success on any claim that would
2 support enjoining the foreclosure sale.

3 **I. BACKGROUND**

4 Salvador purchased the property for \$1,074,420 in September 2006. ECF No. 1 at 52. She
5 obtained a \$752,000 adjustable rate note from Meridias Capital, Inc. to partially finance the
6 purchase, and she made a \$322,420 down payment. *Id.* at 3, 8, 14. The loan was secured by a
7 deed of trust encumbering the property. ECF No. 11-2.¹ The deed of trust identified Salvador as
8 the borrower, Meridias as the lender, First American Title as the trustee, and Mortgage Electronic
9 Registration Systems, Inc. (MERS) as the beneficiary solely as the nominee for the lender and its
10 successors and assigns. *Id.* at 2-3.

11 There is no recorded assignment of the loan or deed of trust from Meridias to
12 Countrywide, but Salvador made mortgage payments to Countrywide. ECF No. 1 at 4. The loan
13 then passed to Bank of America, but there is no recorded assignment of the loan or deed of trust
14 reflecting a transfer from Countrywide to Bank of America. *Id.* Salvador made mortgage
15 payments to Bank of America and sought a loan modification, but was denied. *Id.*

16 In March 2012, MERS assigned the deed of trust to BONY, as trustee for the holders of
17 the Alternative Loan Trust 2006-OA19, Mortgage Pass Through Certificates, Series 2006 OA19.
18 *Id.* at 75. In December 2013, BONY substituted the original trustee, First American Title, with
19 defendant Quality Loan Servicing Corporation. *Id.* at 77.

20 On June 12, 2014, Quality recorded a notice of default and election to sell. *Id.* at 81. In
21 connection with that notice, Quality recorded an affidavit of authority to exercise the power of
22 sale executed by defendant Select Portfolio Servicing, Inc. *Id.* at 85-88. That affidavit identified
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25 ¹ When ruling on a Rule 12(b)(6) motion to dismiss, I generally may not consider evidence outside
26 the complaint without converting the motion into one for summary judgment. *See* Fed. R. Civ. P. 12(b).
27 However, I may consider certain materials without converting the motion. For example, I may take
28 judicial notice of the fact that documents were recorded in the Clark County recorder's office, although I
do not take judicial notice of the truth of any statements therein because those facts are subject to
reasonable dispute. *United States v. Ritchie*, 342 F.3d 903, 908-09 (9th Cir. 2003) (citing Fed. R. Evid.
201(b)). I therefore will take judicial notice of the fact that the deed of trust was recorded.

1 BONY, care of Select Portfolio, as the holder of the note and beneficiary of record. *Id.* at 85-86.
2 Quality was identified as the loan servicer. *Id.* at 86. The affidavit also identified the only
3 recorded assignment of the deed of trust as the March 2012 transfer from MERS to BONY. *Id.* at
4 87-88.

5 On October 14, 2014, Salvador and Quality participated in a mediation conference under
6 Nevada's Foreclosure Mediation Program (FMP). *Id.* at 91. The parties were unable to reach a
7 resolution, and the FMP issued a certificate allowing BONY to proceed with the foreclosure
8 process. *Id.* In May 2015, Quality recorded a notice of a trustee's sale set for June 10, 2015. *Id.* at
9 92. That sale did not take place, and on September 3, 2015, Quality rescinded the June 12 notice
10 of default. *Id.* at 79.

11 Quality recorded a new notice of default and election to sell in April 2016. *Id.* at 95. That
12 notice included another affidavit of authority to exercise the power of sale identifying BONY,
13 care of Select Portfolio, as the note holder and beneficiary of record, and Select Portfolio as the
14 loan servicer. *Id.* at 100. It identified the only recorded assignment of the deed of trust as being
15 the March 2012 assignment from MERS to BONY. *Id.* at 102. Salvador elected to again proceed
16 to mediation under the FMP on May 9, 2016. ECF No. 74-1. The parties had an unsuccessful
17 mediation on August 22, 2016. ECF No. 74-2. The FMP indicated it would issue a certificate of
18 foreclosure on October 17, 2016. *Id.* However, the FMP did not actually issue the certificate until
19 February 28, 2018, which was recorded on March 8, 2018. ECF No. 69-10. Quality issued a new
20 notice of sale on March 30, 2018, setting the sale for April 27. ECF No. 69-11.

21 Based on these allegations, Salvador brought suit in this court alleging that the defendants
22 violated various federal and state laws by placing her into a negative amortization loan where her
23 loan balance would increase even as she made timely payments. She also alleges BONY cannot
24 foreclose because it cannot show it is the holder of the note and beneficiary of record because
25 there is no recorded assignment from Meridias to Countrywide or from Countrywide to Bank of
26 America, so the transfer from Bank of America to BONY is invalid. Salvador asserts the
27 defendants are liable under 15 U.S.C. § 45(a); the Truth in Lending Act (TILA), 15 U.S.C.
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1 § 1601, *et seq.*; the Homeownership Equity Protection Act (HOEPA), 15 U.S.C. § 1689; 15
2 U.S.C. § 1607; and Nevada Revised Statutes § 598D.

3 Salvador previously moved for an injunction, which I denied because she did not identify
4 a potential impending foreclosure sale. ECF Nos. 3, 4. The defendants then moved to dismiss on
5 a variety of grounds. Salvador filed two motions for summary judgment. She also moves to
6 enjoin the recently noticed foreclosure sale.

7 **II. SALVADOR’S MOTIONS FOR SUMMARY JUDGMENT (ECF Nos. 39, 48)**

8 Salvador moves for summary judgment against Bank of America, BONY, and Bayview,
9 arguing that they failed to timely respond to the complaint after being served. She also argues she
10 did not receive documents from these defendants after the court later ordered the defendants to
11 send them to her. Bank of America responds that service was never properly completed on it
12 because Salvador never requested or obtained a summons, so Bank of America was not served
13 with a copy of the summons. BONY and Bayview respond that they attempted personal service
14 on Salvador several times but were unable to contact her at her home, so they mailed their motion
15 to dismiss via first class mail. They also note that Salvador is not prejudiced because she
16 obtained both a copy of their motion and Bank of America’s joinder to Select Portfolio’s motion.

17 The docket does not reflect that Salvador requested or obtained a summons. *See also* ECF
18 No. 7 (Salvador’s certificate of service showing she mailed the complaint, her request for
19 injunctive relief, and a notice of lis pendens, but no mention of a summons). She thus has not
20 properly served Bank of America, BONY, or Bayview under Federal Rule of Civil Procedure
21 4(c). Consequently, these defendants have not defaulted by failing to respond within twenty-one
22 days. *See* Fed. R. Civ. P. 12(a)(1)(A)(i) (providing that the defendant must serve an answer
23 “within 21 days after being served with the summons and complaint”). Further, Salvador did not
24 follow the proper procedure to obtain a default judgment by first seeking entry of default under
25 Rule 55(a).

26 Even if these defendants defaulted, I would set aside entry of default. “The court may set
27 aside an entry of default for good cause” Fed. R. Civ. P. 55(c). When determining whether
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1 good cause exists, the court considers (1) “whether the defendant’s culpable conduct led to the
2 default,” (2) “whether the defendant has a meritorious defense,” and (3) “whether reopening the
3 default judgment would prejudice the plaintiff.” *TCI Grp. Life Ins. Plan v. Knoebber*, 244 F.3d
4 691, 696 (9th Cir. 2001), *overruled on other grounds*, *Egelhoff v. Egelhoff ex. rel. Breiner*, 532
5 U.S. 141 (2001). With regard to the first factor, “a defendant’s conduct is culpable if he has
6 received actual or constructive notice of the filing of the action and intentionally failed to
7 answer.” *Id.* at 697 (emphasis and quotation omitted). However, if the defendant offers a good
8 faith explanation for its neglectful failure to answer, and that explanation negates any intent to
9 take advantage of the plaintiff, interfere with judicial decision-making, or otherwise manipulate
10 the legal process, such failure is not “intentional.” *Id.* at 697-98. A defendant’s conduct is
11 culpable “where there is no explanation of the default inconsistent with a devious, deliberate,
12 willful, or bad faith failure to respond.” *Id.* at 698.

13 Here, BONY and Bayview filed a motion to dismiss on December 26, 2017. ECF No. 19.
14 Bank of America filed a joinder to Select Portfolio’s motion to dismiss on January 2, 2018. ECF
15 No. 22. Thus, within approximately a month and a half after Salvador filed her complaint, the
16 defendants responded despite the improper service. There is no evidence the defendants engaged
17 in culpable conduct. The defendants have offered meritorious defenses to Salvador’s claims.
18 Finally, reopening would not prejudice Salvador. The defendants promptly filed their motions
19 and Salvador has had an opportunity to respond to them. Further, as discussed below, Salvador’s
20 claims are subject to dismissal, and her motions are not supported by evidence showing she is
21 entitled to judgment as a matter of law on any of her claims. *See* Fed. R. Civ. P. 56. I therefore
22 deny Salvador’s motions for summary judgment.

23 **III. MOTIONS TO DISMISS (ECF Nos. 11, 14, 19)**

24 In considering a motion to dismiss, “all well-pleaded allegations of material fact are
25 taken as true and construed in a light most favorable to the non-moving party.” *Wylar Summit*
26 *P’ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). However, I do not
27 necessarily assume the truth of legal conclusions merely because they are cast in the form of
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1 factual allegations in the complaint. *See Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55
2 (9th Cir. 1994). A plaintiff must make sufficient factual allegations to establish a plausible
3 entitlement to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Such allegations
4 must amount to “more than labels and conclusions, [or] a formulaic recitation of the elements of a
5 cause of action.” *Id.* at 555.

6 **A. 15 U.S.C. § 45(a)**

7 Salvador alleges she was placed into a negative amortization loan, which she contends is
8 an illegal practice under 15 U.S.C. § 45(a). The defendants argue this claim fails as a matter of
9 law because it does not apply to banks; there is no private right of action under § 45; even if there
10 were, none of these defendants was involved in originating the loan; and the loan is an adjustable
11 rate loan, not a negative amortization loan. Salvador responds that because the defendants
12 economically benefitted from the transaction, they are accomplices to the alleged predatory loan
13 practices.

14 Section 45(a)(1) declares unlawful “[u]nfair methods of competition in or affecting
15 commerce, and unfair or deceptive acts or practices in or affecting commerce” There is no
16 private right of action under this statute. *Carlson v. Coca-Cola Co.*, 483 F.2d 279, 280-81 (9th
17 Cir. 1973). Enforcement of § 45 lies with the Federal Trade Commission. *See* 15 U.S.C.
18 §§ 41, 45(a)(2), 45(m). I therefore grant the defendants’ motions to dismiss this claim with
19 prejudice.

20 **B. TILA, HOEPA, 15 U.S.C. § 1607**

21 Salvador’s complaint cites to TILA, HOEPA, and 15 U.S.C. § 1607. The defendants
22 argue these statutes do not apply to them because they were not involved in originating the loan,
23 Salvador has not identified what provisions the defendants allegedly violated, and the claims are
24 time barred. Salvador responds that because the loan was a negative amortization loan that she
25 was duped into accepting, it is void and cannot be enforced regardless of the statute of limitations.

26 “A claim may be dismissed as untimely pursuant to a 12(b)(6) motion only when the
27 running of the statute of limitations is apparent on the face of the complaint.” *United States ex rel.*
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1 *Air Control Techs., Inc. v. Pre Con Indus., Inc.*, 720 F.3d 1174, 1178 (9th Cir. 2013) (alteration
2 and quotation omitted). Generally, TILA and HOEPA claims must be brought “within one year
3 from the date of the occurrence of the violation . . .” 15 U.S.C. § 1640(e). Claims alleging a
4 violation of sections 1639, 1639b, or 1639c “may be brought . . . before the end of the 3-year
5 period beginning on the date of the occurrence of the violation.” *Id.* These limitation periods are
6 subject to equitable tolling “in situations where, despite all due diligence, the party invoking
7 equitable tolling is unable to obtain vital information bearing on the existence of the claim.”
8 *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1045 (9th Cir. 2011) (quotation
9 omitted).

10 It is apparent from the face of the complaint that these claims are time barred. The
11 limitation periods commenced when Salvador executed her loan documents in 2006, because she
12 “could have discovered the alleged disclosure violations and discrepancies at that time.” *Id.* She
13 does not allege that she was not given a copy of her note, and she attaches a copy of it to her
14 complaint. Salvador does not identify any basis for equitable tolling. She did not file this
15 complaint until November 2017, more than eleven years after she originated her loan. These
16 claims thus are untimely, and I dismiss them with prejudice.²

17 **C. Nevada Revised Statutes § 598D**

18 Salvador alleges the negative amortization loan is illegal under Nevada Revised Statutes
19 § 598D. The defendants argue that § 598D is directed at the practices of the lender who
20 originates the loan, and they were not involved in the loan origination. They also argue Salvador
21 has not alleged that the loan’s terms were not fully disclosed to her. Finally, they contend the
22 limitation period has run.

23 Salvador responds that the loan was unaffordable and was made to her based on her assets
24 rather than her ability to repay the loan. She also argues she was induced into the loan because
25 she was told it was a sound decision to start with a lower payment because the property value
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27 ² Salvador does not specifically mention rescission, but any such claim would also be
28 untimely. *See id.* § 1635(f).

1 would increase and she could refinance within a few years, but then the market turned and she
2 was unable to do so. She asserts the Meridias salespeople defrauded her.

3 At the time Salvador's loan was originated, § 598D made it an unfair lending practice "for
4 a lender to . . . [k]nowingly or intentionally make a home loan to a borrower based solely upon
5 the equity of the borrower in the home property and without determining that the borrower has
6 the ability to repay the home loan from other assets, including, without limitation, income." Nev.
7 Rev. Stat. § 598D.100(1)(b) (2006). Salvador's claim under § 598D fails because she does not
8 allege that any of these defendants was involved with the origination of the loan. Consequently,
9 none of these defendants made the loan to her. *See Davenport v. Homecomings Fin., LLC*, No.
10 56322, 2014 WL 1318964, at *2 (Nev. Mar. 31, 2014); *Vo v. Am. Brokers Conduit*, No. 3:09-CV-
11 00654-LRH-VPC, 2010 WL 2696407, at *2 (D. Nev. July 2, 2010) ("A loan servicer who did not
12 make the loan at issue cannot be subject to an unfair lending practices claim."). Moreover, it is
13 apparent from the face of the complaint that this claim is time barred. *See Nev. Rev. Stat.*
14 *§ 11.190(3)(a)* (providing for a three-year limitation period for an "action upon a liability created
15 by statute, other than a penalty or forfeiture"). I therefore dismiss this claim with prejudice.

16 **D. Request for Mortgage Note Audit**

17 Salvador alleges BONY lacks standing to foreclosure because there are no records in the
18 recorder's office showing transfers to Countrywide or Bank of America even though these two
19 entities collected mortgage payments from her. She requests a mortgage note audit or any other
20 relief the court finds justifiable. The defendants argue there is no legal basis for this requested
21 relief. Additionally, BONY and Bayview argue Salvador lacks standing to challenge any
22 assignments of the loan or deed of trust.

23 Salvador fails to state a claim against any defendant, so she has no basis to request relief
24 such as a mortgage note audit. Further, Salvador has no standing to challenge the assignment
25 from MERS to BONY. *See Wood v. Germann*, 331 P.3d 859, 861 (Nev. 2014); *Hakimi v. Bank of*
26 *New York Mellon*, No. 2:14-CV-02215-JCM-CWH, 2015 WL 2097872, at *5 (D. Nev. May 5,
27 2015); *Viloria v. Premium Capital Funding LLC*, No. 2:12-CV-00406-KJD-PAL, 2012 WL
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1 4361252, at *3 (D. Nev. Sept. 20, 2012). Moreover, Salvador has twice participated in the FMP,
2 which twice issued a certificate allowing BONY to proceed with the foreclosure process. Under
3 the FMP, for a certificate of foreclosure to issue, the beneficiary of the deed of trust or its
4 representative was required to produce documents showing it actually had the power to foreclose.
5 *See Edelstein v. Bank of New York Mellon*, 286 P.3d 249, 255 (Nev. 2012) (en banc). BONY
6 apparently made this showing because the certificate to foreclose was issued two separate times.

7 Additionally, Salvador's allegation that Countrywide and Bank of America are not in the
8 recorded chain of title does not plausibly allege the transfer from MERS to BONY is invalid.
9 First, the lack of recorded transfers to Countrywide and Bank of America likely is a function of
10 MERS being the original beneficiary under the deed of trust. "MERS is a private electronic
11 database . . . that tracks the transfer of the 'beneficial interest' in home loans, as well as any
12 changes in loan servicers." *Id.* at 256 (quotation omitted). As the Supreme Court of Nevada has
13 explained:

14 Typically, when a loan is originated, MERS is designated in the deed of trust as a
15 nominee for the lender and the lender's successors and assigns, and as the deed's
16 beneficiary which holds legal title to the security interest conveyed. MERS' role
17 in subsequent note transfers depends on whether or not the note is transferred to
18 another MERS member or a non-MERS member. If the lender sells or [transfers]
19 the . . . [note] to another MERS member, the change is recorded only in the MERS
20 database, not in county records, because MERS continues to [be the beneficiary of
21 record] on the new lender's behalf. According to MERS, this system saves lenders
time and money, and reduces paperwork, by eliminating the need to prepare and
record assignments when trading loans. However, [a] side effect . . . is that a
transfer of an interest in a mortgage [note] between two MERS members is
unknown to those outside the MERS system. Conversely, [i]f the . . . [note] is sold
to a non-MERS member, the [assignment] of the deed from MERS to the new
lender is recorded in county records and the [note] is no longer tracked in the
MERS system.

22 *Id.* (internal citations and quotations omitted). Countrywide and Bank of America likely were
23 MERS members, so the transfers to them were not recorded. But even if they were not, Salvador
24 does not plausibly allege facts showing that the transfer from MERS, who was the original
25 beneficiary, to BONY is invalid. Instead, she at most suggests that Countrywide and Bank of
26 America improperly collected mortgage payments from her, although she does not allege these

1 payments were not applied to her loan now held by BONY. Consequently, Salvador has no basis
2 to request a “mortgage note audit” or some other relief.

3 **E. Amendment**

4 In her oppositions, Salvador requests to add MERS as a defendant. She also alludes to
5 other claims she might bring against these defendants, such as conspiracy or civil RICO.

6 Generally, a plaintiff may amend her complaint once “as a matter of course” within 21
7 days after serving it, or 21 days after service of a responsive pleading or motion. Fed. R. Civ. P.
8 15(a)(1). In all other cases, a party may amend her pleading only by leave of court or with
9 written consent of the adverse party. Fed. R. Civ. P. 15(a)(2). I should “freely give leave when
10 justice so requires.” *Id.* I consider five factors in deciding whether to grant leave to amend: “(1)
11 bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment, and (5)
12 whether plaintiff has previously amended his complaint.” *Allen v. City of Beverly Hills*, 911 F.2d
13 367, 373 (9th Cir. 1990). The futility analysis determines whether the proposed amendment
14 would survive a challenge of legal insufficiency under Federal Rule of Civil Procedure 12(b)(6).
15 *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir.1988).

16 I deny leave to amend to reassert any of the claims alleged in the complaint against the
17 defendants because amendment would be futile. As discussed above, Salvador’s claims either do
18 not exist as a private right of action, cannot be alleged against these defendants, or are time
19 barred. I also deny Salvador’s request to “add” MERS as a defendant because she has not filed a
20 proper motion to amend identifying what claims she would assert against MERS, along with
21 plausible factual allegations in support. To the extent her claims would be the same as the ones
22 already asserted, they would fail for the reasons set forth in this order.

23 However, because Salvador is a pro se plaintiff, I will grant leave to amend to add other
24 claims if Salvador can allege facts showing a plausible entitlement to relief. *See Ferdik v.*
25 *Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992), *as amended* (May 22, 1992) (stating that “before
26 dismissing a pro se complaint the district court must provide the litigant with notice of the
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1 deficiencies in his complaint in order to ensure that the litigant uses the opportunity to amend
2 effectively”).

3 Salvador suggests she would allege claims for civil conspiracy, civil RICO, and fraud.³
4 To allege a civil conspiracy claim, Salvador must allege facts plausibly showing that “two or
5 more persons [undertook] some concerted action with the intent to accomplish an unlawful
6 objective for the purpose of harming [Salvador], and damage result[ed].” *Guilfoyle v. Olde*
7 *Monmouth Stock Transfer Co.*, 335 P.3d 190, 198 (Nev. 2014) (en banc). To allege a federal civil
8 RICO claim, Salvador must allege facts plausibly supporting each of the following elements: “(1)
9 conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as ‘predicate
10 acts’) (5) causing injury to plaintiff’s business or property.” *Living Designs, Inc. v. E.I. Dupont de*
11 *Nemours & Co.*, 431 F.3d 353, 361 (9th Cir. 2005) (quotations omitted). To allege fraud,
12 Salvador must allege facts supporting each of the following elements: (1) the defendant made a
13 false representation; (2) the defendant knew or believed that the representation was false (or had
14 an insufficient basis for making the representation); (3) the defendant intended to induce the
15 plaintiff to act or to refrain from acting in reliance upon the misrepresentation; (4) the plaintiff
16 justifiably relied on the misrepresentation; and the plaintiff was damaged as a result. *Bulbman,*
17 *Inc. v. Nevada Bell*, 825 P.2d 588, 592 (Nev. 1992). Additionally, taking as true Salvador’s
18 allegations that she made mortgage payments to Countrywide and Bank of America, and
19 accepting a reasonable inference from her allegations that these two entities were strangers to the
20 mortgage, it is theoretically possible that she could assert claims against these two entities. I
21 therefore will grant leave to amend if sufficient facts exist to support amendment.

22 Although I am granting leave to amend, as discussed below, Salvador has little to no
23 likelihood of success on any claim against these defendants. However, because the Rules favor
24 liberal amendment, particularly for pro se litigants, I will grant leave to amend.

26 ³ Salvador also mentions the Model Penal Code. But the Model Penal Code is not applicable law.
27 It is a publication by a private entity that is a “source of guidance” for interpreting criminal law. *United*
28 *States v. U.S. Gypsum Co.*, 438 U.S. 422, 444 (1978). Consequently, Salvador may not amend to add a
claim under the Model Penal Code because no such claim exists.

1 **IV. MOTION FOR INJUNCTIVE RELIEF**

2 Salvador moves to enjoin the impending foreclosure sale set for April 27. To obtain a
3 preliminary injunction, Salvador must demonstrate: (1) a likelihood of success on the merits, (2) a
4 likelihood of irreparable harm, (3) the balance of hardships favors her, and (4) an injunction is in
5 the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

6 Alternatively, Salvador must demonstrate (1) serious questions on the merits, (2) a likelihood of
7 irreparable harm, (3) the balance of hardships tips sharply in the plaintiff's favor, and (4) an
8 injunction is in the public interest. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135
9 (9th Cir. 2011).

10 Salvador cannot show even serious questions going to the merits. I have dismissed all of
11 her claims with prejudice. Although I am granting her leave to amend, I see little to no likelihood
12 of success on any claim Salvador might allege against these defendants that would justify
13 enjoining the foreclosure sale, and it is likely any claim she would assert is time-barred. Salvador
14 does not deny that her loan is in default and has been for many years now. BONY has twice
15 obtained a certificate of foreclosure from the FMP. ECF Nos. 1 at 91; 69-10 at 2. Thus, BONY
16 has demonstrated to the FMP's satisfaction that it has standing to foreclose.

17 In her motion, Salvador makes two new arguments. She first argues that because the
18 transfers to Countrywide and Bank of America were not recorded, Quality cannot conduct the
19 sale pursuant to Nevada Revised Statutes § 106.210(1). That statute states that if the beneficial
20 interest under the deed of trust has been assigned, the trustee may not exercise the power of sale
21 until that assignment is recorded. However, the assignment from MERS to BONY has been
22 recorded. Consequently, § 106.210(1) does not preclude Quality from exercising the power of
23 sale on BONY's behalf.

24 Next, Salvador argues Quality violated Nevada's Homeowner Bill of Rights because the
25 March 26, 2018 notice of sale was not recorded within nine months of the April 8, 2016 notice of
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1 default and election to sell. Quality responds that the time period was tolled because Salvador
2 filed for bankruptcy and the FMP certificate on the second notice of default only recently issued.⁴

3 Under Nevada Revised Statutes § 107.550(1)(b), a “civil action for a foreclosure sale
4 pursuant to NRS 40.430 involving a failure to make a payment required by a residential mortgage
5 loan must be dismissed without prejudice, any notice of default and election to sell recorded
6 pursuant to subsection 2 of NRS 107.080 or any notice of sale recorded pursuant to subsection 4
7 of NRS 107.080 must be rescinded, and any pending foreclosure sale must be cancelled, if . . . [a]
8 notice of sale is not recorded within 9 months after the notice of default and election to sell is
9 recorded pursuant to subsection 2 of NRS 107.080” Section 107.550(2) tolls this time
10 period under two circumstances relevant here. First, if the borrower files for bankruptcy, the time
11 is tolled “until the bankruptcy court enters an order closing or dismissing the bankruptcy case or
12 granting relief from a stay of foreclosure or trustee’s sale.” Nev. Rev. Stat. § 107.550(2)(a).
13 Second, if the matter is required to be mediated under the FMP, the time is tolled “until the date
14 on which Home Means Nevada, Inc., or its successor organization, issues the certificate pursuant
15 to NRS 107.086 that mediation has been completed in the matter.” *Id.* § 107.550(2)(b).

16 The notice of default was recorded on April 8, 2016. ECF No. 1 at 95. Salvador elected to
17 participate in the FMP on May 9, 2016. ECF No. 74-1. Consequently, the nine months were
18 tolled starting on May 9, 2016, at which point only one month had passed. Salvador filed for
19 bankruptcy on October 14, 2016. ECF No. 69-8. The bankruptcy court dismissed the case on
20 November 5, 2017. ECF No. 69-9. As a result, at a minimum the time from May 9, 2016 through
21 November 5, 2017 was tolled. Quality filed the notice of trustee’s sale on March 26, 2018. ECF
22 No. 69-11. Consequently, the notice of sale was timely. Further, the FMP certificate related to
23 the April 2016 notice of default was not issued until February 28, 2018 and was not recorded until
24 March 8, 2018. ECF Nos. 69-10, 69-11. Thus, the entire time from May 9, 2016 through at least
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27 ⁴ I initially found Quality’s response lacking in evidentiary support, and so ordered a
28 supplement. ECF No. 72.

1 February 28, 2018 was tolled. As a result, Quality's notice of sale was timely, and there is no
2 basis to enjoin the sale under § 107.550.

3 In sum, Salvador cannot show a likelihood of success on any claim that would support
4 enjoining the foreclose sale. Consequently, I deny her motion.

5 **V. CONCLUSION**

6 IT IS THEREFORE ORDERED that plaintiff Editha Salvador's motions for summary
7 judgment **(ECF Nos. 39, 48) are DENIED.**

8 IT IS FURTHER ORDERED that defendant Quality Loan Servicing Corp.'s motion to
9 strike **(ECF No. 41) is DENIED as moot.**

10 IT IS FURTHER ORDERED that the defendants' motions to dismiss **(ECF Nos. 11, 14,**
11 **19) are GRANTED.**

12 IT IS FURTHER ORDERED that plaintiff Editha Salvador may file an amended
13 complaint consistent with this order, if sufficient facts exist to do so. Salvador must file her
14 amended complaint on or before May 18, 2018. Failure to file an amended complaint by that date
15 will result in dismissal of this case with prejudice.

16 IT IS FURTHER ORDERED that plaintiff Editha Salvador's motion to enjoin the
17 foreclosure sale **(ECF No. 67) is DENIED.**

18 IT IS FURTHER ORDERED that the clerk of court shall seal ECF Nos. 1 and 3 because
19 the attached exhibits contain unredacted social security numbers.

20 DATED this 25th day of April, 2018.

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24 ANDREW P. GORDON
25 UNITED STATES DISTRICT JUDGE
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